United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Erik DeBenedictis	)		
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Filing Date:	December 2, 2019	)	Case No.:	WBU-20-0003
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Issued: December 31, 2019

Decision and Order

Erik DeBenedictis (the Appellant), an employee of National Technology & Engineering Solutions of Sandia, LLC (Sandia), appealed the dismissal of a whistleblower complaint he filed under 10 C.F.R. Part 708, the Department of Energy (DOE) Contractor Employee Protection Program. The DOE Sandia Head of Field Element for Albuquerque, New Mexico (Head of Field Element) dismissed the Appellant's complaint on November 21, 2019, for lack of jurisdiction. For the reasons set forth herein, the Appellant's appeal is granted.

I. BACKGROUND

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities. 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to report unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers. The regulations governing the program are set forth at Title 10 Part 708 of the Code of Federal Regulations.

The Part 708 regulations provide, in pertinent part, that a DOE contractor may not discharge or take some other reprisal action against an employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably believes reveals a substantial violation of a law, rule, or regulation; a substantial and specific danger to employees or to the public health or safety; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a).

Under Part 708, the Head of Field Element or Employee Concerns Director who receives a complaint may dismiss the complaint due to lack of jurisdiction or for other good cause. 10 C.F.R. § 708.18(a). Such a dismissal is appropriate under any of the following circumstances: (1) the complaint is untimely; (2) the facts, as alleged in the complaint, do not present issues for which relief can be granted under Part 708; (3) the employee filed a complaint under State or other applicable law with respect to the same facts as alleged in the Part 708 complaint; (4) the complaint is frivolous or without merit on its face; (5) the issues presented in the complaint have been rendered moot by subsequent events or substantially resolved; or (6) the employer has made a formal offer to provide the remedy that was requested in the complaint or a remedy that DOE considers to be equivalent to what could be provided as a remedy under Part 708. 10 C.F.R. § 708.18(c). The employee may appeal a dismissal due to lack of jurisdiction or other good cause to the Director of the Office of Hearings and Appeals. 10 C.F.R. § 708.18.

B. Complaint

On October 11, 2019, the Appellant filed a Part 708 complaint (Complaint) with the Sandia Head of Field Element. The Complaint alleges two protected disclosures.

Protected Disclosure 1 alleges that on November 26, 2018, he "[a]pprised the patent attorney of a foreign trip related [to] IEEE (a professional society) where my manager directed me to charge vacation for time performing NTESS/DOE business and other potentially improper requests." Complaint at 2. The Appellant elaborates that subsequently, he forwarded an email from his manager to the patent attorney regarding an invention he claimed to have developed in a private capacity.[1] This forwarded email directed the Appellant to act only as an individual (and not as a representative of Sandia) when communicating with a specific professional organization, to avoid using Sandia resources to develop inventions not related to his employment, and to inform the manager of any of his activities regarding his field of research. Complaint at 2.[2] The Complaint goes on to state that this protected disclosure's "main allegation is gross mismanagement." Complaint at 8.

The Appellant alleged additional protected disclosures in his Complaint under the section entitled, "Protected Disclosure 2: Abuse of Security Program (SIMP)." In this allegation, the Appellant alleges that he made the following statements to his line Vice President:

> 1. My manager, acting in the role of a derivative classifier, identified document SD 14940, containing the patent disclosure from protected disclosure 1, as export controlled when he had no reason to believe it was, representing abuse of government information protection procedures.

[1] The individual's invention is described in two numbered notices in the Sandia patent system. Complaint at 2.

[2] The Appellant asserts that that his manager's directives did not comply with relevant intellectual property laws, including the Bayh-Dole Act, 35 U.S.C. §§ 200-212, which addresses procedures that federal contractors are required to follow concerning the acquired ownership of inventions made with federal funding. Complaint at 2, 8. The Complaint ultimately alleges that management engaged in gross mismanagement when it caused Sandia to lose a patent by implementing noncompliant directives and applying them to his invention, degrading the IP rights and making ownership of the invention impossible to determine. Complaint at 1-2, 8, 10.

> 2. Somebody in my line management chain reported me to the Security Incident Management Program (SIMP) on an allegation that I had export-controlled documents on my home computer, even though the only potentially sensitive document SD 14940 was in the patent-idea database and had been evaluated for sensitivity. This represents abuse of SIMP, because SIMP was intended only [for] security incidents, not intimidation of employees or determination of IP ownership.
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> 3. My third-level manager "boasted" about the previous items in a center-wide memo. This is not a violation by itself, but it acknowledges review of the matter by a third-level manager, elevating it beyond a simple mistake.
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> 4. Retaliation by my first and second levels managers and the HR business partner on Thursday, February 28, 2019 by delivering a document threatening termination (a management expectations document) included in appendix 4, establishing the connection between protected disclosure 1 and a threat of termination.
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> 5. Furthermore, on page 3 of the management expectations document in appendix 4, in the section on "Cooperation with SIMP Inquiry" the last sentence is "Thus, it is reasonable and necessary for SIMP to review the data [on my home computer] to ensure there are no security concerns. Review of the data/documents would also enable an accurate determination of ownership…" I'm asserting that this is an admission by line management that they were abusing SIMP.

Complaint at 3. The Complaint asserts that these statements, taken together, allege that Sandia "used the government security apparatus to retaliate against" him. Complaint at 11.

The Head of Field Element dismissed the Appellant's Complaint on November 21, 2019 (Dismissal) for lack for jurisdiction based on failure to state a claim for which relief can be granted, failure to disclose information that reveals a substantial violation of law, rule or regulation, and the complaint's frivolity. Dismissal at 1–2; 10 C.F.R. § 708.18; 10 C.F.R. § 708.5.

The Dismissal found that the Appellant's disagreement with Sandia intellectual property (IP) counsel and management's interpretation of Sandia's Employee Proprietary Information and Information Agreement and their related actions concerning protection of IP rights did not reveal a substantial violation of law, rule, or regulation under 10 C.F.R. 708.5. Dismissal at 1. The Dismissal also found that the Appellant had failed to make his protected disclosure to a DOE official as described in the regulation. *Id.* The Dismissal further concluded that management's decision to report the Appellant to SIMP was based on his refusal to self-report, and therefore "does not constitute an abuse of the security program or a substantial violation of a law, rule, or regulation." Dismissal at 2.

On December 2, 2019, the Appellant appealed Sandia's dismissal of his original complaint to OHA. Sandia submitted a response to the appeal and argued that the dismissal should be affirmed. Response at 1. The Appellant filed a reply to Sandia's response on November 14, 2019, in which

he argued predominantly that the disclosure he made under "Protected Disclosure 2" sufficiently alleged a substantial violation of law, rule, or regulation. Reply at 1.

II. LEGAL STANDARD

A. Standard of Review

The Part 708 regulations do not specify procedures or standards for motions to dismiss. Accordingly, we look to the Federal Rules of Civil Procedure, which, though they do not govern this proceeding, may be used as a guide. *See, e.g.*, *Hansford F. Johnson*, Case No. TBZ-0104 (November 24, 2010); *Billy Joe Baptist*, Case No. TBH-0080 (May 7, 2009); *Edward J. Seawalt*, Case No. VBZ-0047 (August 20, 2000) (applying standards of Fed. R. Civ. P. 56 to Motion for Summary Judgment). In addition, prior cases of this office instruct that such a motion should be granted only where there are clear and convincing grounds for dismissal, and no further purpose will be served by resolving disputed issues of fact on a more complete record. *Curtis Broaddus*, Case No. TBH-0030 (2006); *Henry T. Greene*, Case No. TBU-0010 (2003) (decision of OHA Director characterizing this standard as "well-settled"); *see also David K. Isham*, Case No. TBH-0046 (2007) (complaint may be dismissed where it fails to allege facts which, if established, would constitute a protected disclosure).

The Motion to Dismiss is analogous to a motion to dismiss brought under the Federal Rules of Civil Procedure for "failure to state a claim upon which relief can be granted . . . ." Fed. R. Civ. P. 12(b)(6). It is well established that to survive a Rule 12(b)(6) motion to dismiss, a complaint is required to plead "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). More specifically, a complaint must allege facts that, if assumed to be true, are sufficient to state a claim to relief that allows the tribunal to draw a reasonable inference of the defendant's liability. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."). Though well-pleaded factual allegations need not be detailed, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

B. Elements of a Protected Disclosure

Part 708 identifies specific parameters for protected disclosures. First, the disclosure must have been made to "a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at a DOE site, the employer, or any higher tier contractor." 10 C.F.R. § 708.5(a). The substance of the disclosure must reveal "(1) A substantial violation of a law, rule, or regulation; (2) A substantial and specific danger to employees or to public health or safety; or (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority."[3] *Id.* The disclosing party must reasonably believe the substance of the disclosure to be true. Each of these "who, what, and why" elements must be met for a disclosure to be protected under Part 708. However, the questions concerning the reasonableness of belief and whether a violation was substantial are questions of law and need not be answered at this early

[3] Certain conduct may also constitute a protected disclosure. 10 C.F.R. § 708.5(b). However, this provision is not relevant to the issue at hand.

stage. Rather, in light of the above reference standard of review, we are tasked with deciding only whether the Complaint alleges facts that, if true, show that the Appellant made a disclosure covered by § 708.5 to a person specified by § 708.5.

III. ANALYSIS

A. Protected Disclosure 1

Protected Disclosure 1 alleges that the Appellant disclosed to a Sandia patent attorney that Sandia engaged in gross mismanagement when it incorrectly managed an invention that the Appellant conceived of while working in his capacity as a private individual. Complaint at 2, 8.

Though the Head of Field Element that dismissed this case stated that a disclosure must be made to a DOE official, the text of § 708.5 clearly states that disclosures may also be made to "the employer," *i.e.*, the DOE Contractor. As an attorney for Sandia, the IP attorney would have had a duty to escalate concerns about wrongdoing to the appropriate authority. Accordingly, a Sandia patent attorney, while not necessarily a supervisor in the Appellant's chain of command, could plausibly be viewed as an appropriate representative for Sandia for issues relating to IP, similar to the way wrongdoing may be reported to a general counsel's office instead of a program office.

The OHA defines gross mismanagement as:

> [M]ore than de minimis wrongdoing or negligence. It does not include management decisions that are merely debatable, nor does it mean action or inaction which constitutes simple negligence or wrongdoing. There must be an element of blatancy. Therefore, gross mismanagement means a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission."

Fred B. Hua, Case No. TBU-0078 at *4 (2008) (quoting *Roger Hardwick*, Case No. VBA-0032 (1999)). Compliance with federal and state laws regarding the ownership and management of patents is not debatable. Regardless of whether his belief was reasonable,[4] the Appellant believed that his management had engaged in gross mismanagement by violating these laws, alleging blatancy [5] and refusal to correct errors once discovered.[6]

The facts as stated in the Complaint contain all the necessary elements of a protected disclosure and, if true, constitute a plausible claim for which relief may be granted under Part 708. As such, we find that Sandia improperly dismissed Protected Disclosure1.

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[4] Reasonableness is a question of law and, as such, is not ripe for decision at this stage of the Part 708 process.

[5] "My manager did not create his directives, but explicitly stated (per above) that he was adapting rules developed by Sandia's government relations office for a different purpose." Complaint at 9.

[6] "I allege NTESS line management did not follow established procedures and instead introduced chaos, representing mismanagement. … The matter is elevated to gross mismanagement because line management would not fix the error." Complaint at 8.

B. Protected Disclosure 2

As stated above, Protected Disclosure 2 includes several statements amounting to a disclosure to his line Vice President and the Sandia ethics office alleging that Sandia "used the government security apparatus to retaliate against" him. Complaint at 11. He further alleges that the retaliation stemmed from his "reporting abuse of IP," a reference to Protected Disclosure 1. Complaint at 11.

The Appellant's line Vice President was above him in his chain of command and was, therefore, an appropriate representative of Sandia to whom the Appellant may report wrongdoing. Retaliation for making a protected disclosure is prohibited under 10 C.F.R. § 708.43.[7] The Appellant specifically ties the alleged retaliatory acts to his disclosure in Protected Disclosure 1, bringing those actions within the purview of § 708.43.[8] Again, the facts as stated in the Complaint contain all the necessary elements of a protected disclosure and, if true, constitute a plausible claim for which relief may be granted under Part 708. As such, we find that Sandia improperly dismissed Protected Disclosure 2.

IV. CONCLUSION

After reviewing the Appellant's Part 708 complaint, we find that the Appellant alleged facts which, when taken as true, constitute two disclosures plausibly protected by Part 708. Consequently, we find that Sandia's dismissal of the Complaint was in error. We grant the Appellant's appeal and remand this matter to the Field Element for further processing.

It is Therefore Ordered That:

(1) The Appeal filed by Mr. Erik DeBenedictis, Case No. WBU-20-0003, is hereby granted.

(2) This matter is remanded to the Field Element for further processing as set forth in Subpart B of Part 708 as well as 10 C.F.R. § 708.21.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

[7] At the time of the alleged disclosure, the text of 10 C.F.R. § 708.43 read "DOE contractors may not retaliate against any employee because the employee … has taken an action listed in §§ 708.5(a)-(c)."

[8] Whether the retaliation the Appellant alleges is substantial is a question of law that is not appropriate for decision at this time, as is whether the Appellant's beliefs regarding the alleged retaliatory actions were reasonable.